IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 10, 2001 Session

RENA M. FOSTER, ET AL. v. COLONIAL DEVELOPMENT, INC. d/b/a COLONIAL HILLS NURSING CENTER, ET AL.

Appeal from the Circuit Court for Blount County
No. L-11765 W. Dale Young, Judge

FILED FEBRUARY 6, 2002

No. E2000-02917-COA-R3-CV

This is an action for damages for retaliatory discharge of the Plaintiffs because they objected to alleged fraudulent practices involving TennCare or Medicare, brought pursuant to Tenn. Code Ann. § 50-1-304. The Plaintiffs were *prima facie* terminated for failing to clock out for lunch. Their case was dismissed on motion for summary judgment. We affirm.

Tenn. R. Civ. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which HERSCHEL P. FRANKS and D. MICHAEL SWINEY, J.J., joined.

Lance A. Evans, Maryville, Tennessee, for the appellants, Rena M. Foster, Mitzy Johnson, Becky G. Breeden, Tracey R. Waters, and Melissa J. Baker.

Jerry G. Cunningham and Melanie E. Davis, Maryville, Tennessee, for the appellees, Colonial Development, Inc., d/b/a/ Colonial Hills Nursing Center, Jon Byron, and James Woodward.

OPINION

The Plaintiffs were employed as nurses or nurses assistants by the Colonial Hills Nursing Center in Maryville. They alleged that on May 14, 1996, they were wrongfully terminated by their employer because of their objections to the practice of billing the same beds to both Medicare and TennCare, billing unneeded therapeutic services to patients, billing for services not provided, and falsifying patients' charts, all of which were illegal activities proscribed by Tenn. Code Ann. § 71-5-182, *et seq*.

They further alleged that Tenn. Code Ann. § 50-1-304 provides that "no employee shall be discharged or terminated *solely* [emphasis added] for refusing to participate in or for refusing to remain silent about, illegal activities," and that their termination was in direct violation of this statute.

The Plaintiffs further alleged that they were pretextually terminated for failing to punch the time clock at lunch break. Their complaint was filed September 20, 1996, in the chancery court, and transferred to the circuit court on December 17, 1998.

On February 21, 1997, the Defendants filed a Motion for Summary Judgment alleging:

> 1. That the Plaintiffs are collaterally estopped to assert and seek damages in this cause inasmuch as the matter has already been heard by the Unemployment Tribunal with a ruling [that] was in favor of the Defendants relative to the employment termination of the Plaintiffs.
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> 2. That in sworn testimony given at the unemployment hearing . . . it is clear the Plaintiffs were legitimately terminated for failing to clock out pursuant to the policy of Colonial Development, Inc. That by sworn testimony, the Plaintiffs indicated that there had been no retaliatory discharge and asserted that John [sic] Byron had no knowledge of any complaints from any subordinates relative to any alleged illegal activities which had been complained of by the Plaintiffs.
>
> 3. That further at the time of their termination, John [sic] Byron, according to the Plaintiffs' testimony knew nothing relative to the alleged reporting of any activities by the Plaintiffs.

The trial court granted the Motion, finding

> [T]here is no genuine issue as to any material fact in this case inasmuch as Plaintiffs have failed to come forward with sufficient proof to show any causal relationship between the plaintiffs' refusal to participate in or remain silent about alleged illegal activities and the termination of the employees and these defendants are entitled to judgment as a matter of law because proof as to an essential element of the plaintiffs' claim is insufficient.

The Plaintiffs appeal and present for review three issues:

(1) Whether the trial court erred in denying the Plaintiffs' Motion to have their Requests for Admissions deemed admitted by Defendants.

(2) Whether the trial court erred in denying the Plaintiffs' Motion to Compel Discovery.

(3) Whether the Motion for Summary Judgment was properly granted.

Our review is *de novo* on the record with no presumption of correctness. ***Hunter v. Brown***, 955 S.W.2d 49 (Tenn. 1997).

II.

On November 27, 1996, the Plaintiffs, as authorized by Rule 33, Tenn. R. Civ. P., filed seventeen Interrogatories to be answered by the defendants. On the same date, the Plaintiffs filed Requests for Admissions as authorized by Rule 36. These requests generally were directed to the issue of whether Jon Byron, Administrator of Colonial Hills, was aware of the alleged illegal activities and whether the Plaintiffs were terminated because of their objections to the alleged illegal activities.

On the same date the Plaintiffs filed a Rule 34, Motion for the Production of Documents.

On May 28, 1997, the Defendants filed their answers or objections to the Interrogatories. On June 18, 1997, the Defendants filed their answers to the Requests for Admissions.

On May 6, 1997, the Plaintiffs filed a Motion to Compel Discovery, alleging that the Defendants had not responded to the propounded Interrogatories or to the Request for Production of Documents. They further alleged that the parties had agreed to delay discovery until March 31, 1997, but that they were noticed, on March 24, 1997 to present themselves for depositions on April 22, 1997. Plaintiffs' counsel responded by noticing the Defendants that the time for responding to the Interrogatories or to the Requests for Admissions would not extend beyond April 30, 1997.

On the same day the Plaintiffs filed a Motion that the Requests for Admissions be deemed admitted because the parties agreement to delay discovery expired March 31, 1997.

On May 28, 1997, the Defendants responded to the Interrogatories by answer or objection, and on June 18, 1997 responded to the Requests for Admissions by denials, admissions or objections as they thought appropriate.

On June 16, 1997, the Plaintiffs filed another Motion to Compel Discovery, seeking (1) the court's permission to inspect the employees' payroll records for the years 1993 through 1996, (2) the record of a patient, Billy Lusinger, for the period between January 1 and June 1, 1996, (3) documentation of the job-description of two employees, Woodward and Byron, and (4) a ruling on the objections filed by Defendants to certain of the interrogatories relating to employees who were terminated for failure to punch-out for the lunch break.

On October 18, 2000, the court granted the Motion for Summary Judgment filed by the Defendants on February 21, 1997. As heretofore stated, the Motion to Compel Discovery and the Motion to Deem the Requests Admitted, were denied.

The Plaintiffs conceded at the hearing on the Motion for Summary Judgment that "there was only circumstantial evidence that showed the causal relationship between the refusal to remain silent about illegal activities and the termination of the Plaintiffs."

III. The Proof

Rena Foster

Ms. Foster is a registered nurse. She was employed at Colonial before Jon Byron was hired as Administrator in December, 1995.

She was terminated, with five (5) other employees, by Jon Byron, on May 26, 1996, or five (5) months after he was appointed Administrator of the Nursing Center. She testified that Administrator Byron initiated a "lot of changes" in the way "things were done," that she disagreed with, such as not holding the *same* bed for a patient who left the facility for hospitalization because "that was the way it always was."

She testified that "the one time that I really voiced my opinion on it was the Thursday before we was terminated on Tuesday." She did not tell Byron, but told others whom she "assumed" told Byron. She admitted that the appropriate Regulation provided that a bed had to be held 15 days for a patient who was hospitalized, but not necessarily the same bed.

She acknowledged receipt of a Code of Conduct which required employees to clock in and out, and that she attended a meeting on April 24, 1996, chaired by Jon Byron, when the duty of clocking in and out was discussed.

She testified that clocking out for lunch was not discussed, and that she never clocked out for lunch during her eight-year tenure. She "believed" she was terminated because of her expressed disapproval of the "bed situation," and "other."

The other reason Ms. Foster expressed was "Jon said all of the supervisors had to sign the time roster for the skill (Medicare) wing that they worked three-fourths of their time on the skill wing even if they didn't," but that she "didn't falsify anything," although most of the "supervisors did," because they "told me they did."

She testified that she was fired, not for failing to "punch in and out for lunch," as she was told, but because she complained about the failures to "hold the bed." She further testified, "I know they wanted to get rid of me . . . because I voiced my opinions about what I felt like was unethical and illegal actions. . . [T]here was a lot of things that Jon Byron did that I didn't approve of that might not have been illegal. . . ."

Tracey Waters

She was most recently employed by Colonial in November 1994, as a Certified Nursing Assistant. She testified:

> Q. Why do you think you were fired?
>
> A. I had complained about being asked to do two charts and some things that weren't true on a patient so they could be able to get Medicaid.
>
> * * * * *
>
> B. Woody or Byron never asked you to do any of that did they?
>
> A. No.

Rebecca McCullough

She was employed as an LPN at Colonial in 1995, for the second time. She was the manager of the Skilled Unit (Medicare) in April 1996, and was the direct supervision of Mitzi Johnson, who after being warned, failed to punch the time clock for the lunch break.

Melissa Baker

She was employed by Colonial in September 1994 as a Nursing Assistant. She was aware of the Code of Conduct expected of employees, and that it required them to clock in and out. She testified that she had two "run-ins" with James Woodward, the Assistant Administrator, because "I didn't do what Mr. Woodward asked me to do or told me to do. . . the first was on Billy Lusinger . . . he couldn't walk . . . because he had not been walked. Mr. Woodward says, 'Well, fill it in [the record] like you walked him.' I told him no." She never talked to Jon Byron, the Administrator, about anything, but believed that he "knew what was going on."

James D. Woodward

Mr. Woodward is a register nurse, and was the Assistant Administrator of Colonial in 1996 when the Plaintiffs were terminated.

He testified that during his tenure at Colonial he never heard about any of the complaints involved in this litigation.

On the day that Jon Byron terminated the Plaintiffs for failing to clock in and out for lunch, Woodward testified that he became aware of the situation shortly after returning from lunch himself;

that he was called to Byron's office and all six of the individuals were present; that all of them acknowledged they were aware of the requirement to clock in and out.

Becky Breeden

She was a Nursing Assistant at Colonial in 1996. She testified that she knew the Code of Conduct required her to punch in and out for lunch and that she did not do so on the date she was terminated. She was not aware of any alleged illegal activities.

Jon Byron

He was employed as the Administrator of Colonial in November 1995. He directly supervises ten Unit Managers. The Code of Conduct, which required employees to clock in and out for lunch, was previously in effect when he was initially employed, and "I was employed to enforce the rules." He testified that reliance on the time cards was important since they revealed which employees were present in the building; that he was unaware that Ms. Foster had not been clocking out for lunch until he personally observed her and the other Plaintiffs failing to do so on May 14, 1996; and that he had no knowledge or information of any alleged illegal acts.

IV.
Analysis

The Plaintiffs concede that they were employees at will and could have been terminated at any time. This settled doctrine has been modified by the enactment of Tenn. Code Ann. § 50-1-304 which provides that no employee shall be discharged or terminated *solely* for refusing to participate in or refusing to remain silent about illegal activities, which means activities which are in violation of the criminal or civil code of Tennessee or the United States or any regulation intended to protect public health, safety or welfare.

The parties agree that there are four (4) elements necessary to be proved in order to establish a *prima facie* case of retaliatory discharge pursuant to the statute: (1) that the plaintiffs were employees of the defendant; (2) that they refused to participate in or remain silent about illegal activities; (3) that the plaintiffs were discharged; and (4) an exclusive causal relationship between the plaintiffs' refusal to participate in or remain silent about illegal activities and their termination. *See,* ***Griggs v. Coca-Cola Employees Credit Union***, 909 F. Supp. 1059 (E.D. Tenn. 1995).

So far as our knowledge extends, the language of the statute ("no employee shall be . . . terminated *solely* [emphasis added] for refusing . . .") has always been interpreted to mean what it *prima facie* purports. *See, **Griggs**, supra,* and ***Merryman v. Central Parking System, Inc.***, 1992 Tenn. App. LEXIS 935, W.L. 330404. Courts must look to the natural and ordinary meaning of the language used when read in context with the entire statute. ***City of Blaine v. John Coleman Hayes***, 818 S.W.2d 33 (Tenn. App. 1991).

The Plaintiffs argue that the reason given for their termination was pretextual, because they had a history of failing to clock in and out for lunch with no retributive action ever being taken. Hence, they essentially insist that the rule was waived by custom. This argument overlooks the significant fact that Byron, who terminated them, had been the Administrator only about 20 weeks, with no knowledge that any employee was knowingly or deliberately violating a rule which was included in the Code of Conduct and for which a satisfactory reason was expressed. There is substantial proof in the record that the Plaintiffs were terminated for their admitted failure to clock out at lunch, and hence the reason for the terminations was not pretextual. The statute requires that the Plaintiffs prove an *exclusive* causal relationship between the protected activities and their discharges.

The Defendants argue that the Plaintiffs failed to show - cannot show - a causal relationship between their refusal to participate in or remain silent about alleged illegal activities and their terminations, within the ambit of Tenn. Code Ann. § 50-1-304. The Plaintiffs counter with the argument that proof of a causal link between their refusal and their discharges imposes upon the Defendants the burden of showing a legitimate, non-pretextual reason for the employees' dismissal. In this connection the Defendants argue that there is no proof that Byron knew about the purported illegal activities, or that his stated reason for firing the Plaintiffs - failing to clock out for lunch - was pretextual, superimposed upon the employment-at-will status of each Plaintiff, and the requirement that the refusal to participate in or be silent about illegal acts must be the *sole* reason for the termination.

The proof offered by the Plaintiffs respecting the asserted requirement that the holding of "the" bed for a patient who was hospitalized falls short of establishing an illegal act, and need not be noticed further. Suffice to say that, at best, the proof revealed that "a" bed should be held for 15 days, which was done.[1]

Assuming that the evidence respecting the time rosters and the patient charts *prima facie* established illegal acts, there is no proof that Byron had knowledge or such acts. Recognizing this, the Plaintiffs argue that the totality of the circumstances reveal that since Byron was head of management, he should have been aware of the alleged illegal acts. Circumstantial evidence must be compelling on the issue that retaliation was a substantial factor in the decision to terminate the Plaintiffs. ***Thomason v. Better-Bilt Aluminum Products***, 831 S.W.2d 291 (Tenn. App. 1992) although ***Thomason*** involved a discharge for filing a workers' compensation claim, the rationale appears to be appropriate. The circumstantial evidence offered in the case at Bar is not compelling.

Review is limited to the question of whether the Plaintiffs failed to present evidence supporting every essential element of a cause of action under Tenn. Code Ann. § 50-1-304. Rule 56.03 of the Tennessee Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

[1] The purported Regulation is not in the record.

moving party is entitled to a judgment as a matter of law." "[W]hen the facts material to the application of the rule of law are undisputed, the application is a matter of law for the court since there is nothing to submit to the jury to resolve in favor of one party or the other. In other words, when there is no dispute over the evidence establishing the facts that control the application of a rule of law, summary judgment is an appropriate means of deciding that issue." ***Byrd v. Hall***, 847 S.W.2d 208, 214-15 (Tenn. 1993). "Construction of [a] statute and application of the law to the facts [are questions] of law." ***Beare Co. v. Tennessee Dept. of Revenue***, 858 S.W.2d 906, 907 (Tenn. 1993). It follows that the issues raised by the motion for summary judgment of whether the plaintiff failed to present evidence supporting the essential elements of the cause of action, are questions of law. Consequently, the scope of review is *de novo* with no presumption of correctness. *See* Tenn. R. App. P. 13(d); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). "No presumption of correctness attaches to decisions granting [or denying] summary judgments because they involve only questions of law. Thus, on appeal, we must make a fresh determination concerning whether or not the requirements of Tenn. R. Civ. P. 56 have been met." ***Cowden v. Sovran Bank/Central South***, 816 S.W.2d 741, 744 (Tenn. 1991). *See*, ***Mason v. Seaton***, 942 S.W.2d 470 (Tenn. 1997).

Proof of a causal link was weak, but assuming its sufficiency, the burden shifted to the Defendants to show the reason for the discharges. ***Mason v. Seaton***, 942 S.W.2d 470 at 473 (Tenn. 1997). The record is clear that the Defendants proved a legitimate, non-pretextual reason for discharging the Plaintiffs. The burden then became the Plaintiffs, to show that the reason was phoney. *See*, ***Russell v. Acme-Evans Co.***, 51 F.3d 64, 68 (7th Cir. 1995). To defeat summary judgment the Plaintiffs must present specific *admissible* facts which realistically challenge the defendants stated reason. ***Silpachain v. Metro Gov't.,*** 797 S.W.2d 625 (Tenn. App. 1990). Conclusory statements of an employee are not proof of pretext. *See*, ***DeVore v. Deloitte & Touche***, 1998 Tenn. App. LEXIS 122. Moreover, none of the Plaintiffs reported an irregularity to company management, or to TennCare of Medicare, or to any regulatory or law enforcement agency, and a personal belief does not create a genuine issue for trial. ***Newsom v. Textron Aerostructure***s, 924 S.W.2d 87 (Tenn. App. 1995).

V.

For reasons not revealed in the record, the parties agreed to forego discovery procedures until March 31, 1997. Thereafter, discovery was apparently a torturous process, rife with notices and motions, as we have heretofore recited. The Plaintiffs essentially claim that the Defendants failed to make a timely response to the Requests for Admissions which should therefore be deemed to have been admitted, and that further discovery was necessary. As to the latter insistence, we note that the requested further discovery was directed to patients records, payroll sheets, and complaints about the care of patients. We further note that the motion lay fallow for two and one-half years. In light of our disposition of the case, the requested further discovery would have no impact on the result, and in any event we find no reason to intrude upon the trial court's discretion respecting discovery issues. *See*, ***Strickland v. Strickland***, 618 S.W.2d 496 (Tenn. App. 1981), and ***White v. Vanderbilt Univ.***, 21 S.W.3rd 215 (Tenn. App. 1999). The same rationale is applicable to the Requests for

Admissions. We are unable to find that the trial judge abused his discretion by essentially allowing the Defendants to withdraw their admissions by default.

The judgment is affirmed at the costs of the Appellants.

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WILLIAM H. INMAN, SENIOR JUDGE